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 * Nov. 13. J. E. KALLIO (DEFENDANT).....APPELLANT;
 AND
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 * June 26. RUSSELL TIMBER COMPANY LIM- } RESPONDENT.
 ITED (PLAINTIFF)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Practice and Procedure—Set-off—Judgments—Defendant seeking to set off, against plaintiff's execution on judgment in action in Supreme Court of Ontario for damages for trespass, judgments obtained by Workmen's Compensation Board in District Court through certificates filed under s. 108 of Workmen's Compensation Act, R.S.O., 1937, c. 204, and assigned to defendant—Whether mutual debts—Judicature Act, R.S.O., 1937, c. 100, ss. 123, 124—Propriety of the procedure taken—Appeal to Supreme Court of Canada on question of practice in Ontario.

In an action commenced on June 4, 1931, in the Supreme Court of Ontario, plaintiff, on July 7, 1939, recovered judgment against defendant for damages for trespass, and issued execution.

The Workmen's Compensation Board of Ontario had issued five certificates against plaintiff, at various times in the years 1927 to 1934, pursuant to the provisions of what is now s. 108 of *The Workmen's Compensation Act*, R.S.O., 1937, c. 204. The certificates were duly filed with the clerk of a district court and, under said s. 108, when so filed, they would become orders, and be enforceable as judgments, of that court. Executions were issued thereon and kept renewed and were, on the dates hereinafter mentioned, in full force and effect. The Board on December 6, 1934, assigned all its rights, title and interest in said certificates and orders of the court, and all moneys recoverable thereunder, to one who, on February 3, 1936, assigned the same to defendant.

Defendant, on August 2, 1939, paid a sum to the sheriff on plaintiff's execution against him, and claimed to set off the balance as being the amount owing by plaintiff in respect of the five judgments of the Board (obtained through said certificates filed), acquired by defendant as aforesaid. Plaintiff disputed (*inter alia*) defendant's right of set-off. The trial of an issue was directed to determine whether defendant was entitled to set off against the amount of plaintiff's judgment the amount of the Board's judgments acquired by defendant; and whether plaintiff's execution had been satisfied or how much was owing thereunder.

On this issue, Greene J. held that defendant was entitled to such a set-off, subject to the amount thereof being determined by a reference; any amounts embodied in the Board's judgments in the nature of penalties not to be included in computing the total amount due under them. The Court of Appeal for Ontario ([1941] O.W.N. 472; [1942] 2 D.L.R. 120) reversed that decision and held that the claims indicated by the cross judgments were not in their nature mutual debts and there was no right, therefore, to set them off; and moreover, that defendant had not proceeded, on his claim for relief, in the proper way. Defendant appealed to this Court.

* PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Taschereau JJ.

Held: The appeal should be dismissed, without prejudice to any application that defendant might be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against plaintiff by said Board and assigned to defendant.

Per the Chief Justice, and Kerwin, Hudson and Taschereau JJ.: This Court should not interfere with the order of the Court of Appeal in this case on the question of practice in Ontario. But (disagreeing with the Court of Appeal), in plaintiff's said action, judgments against plaintiff in another court, which had been assigned to defendant, could be set off, under ss. 123 and 124 of *The Judicature Act* (R.S.O., 1937, c. 100); all that is required by these sections is that there should be a mutual debt; the debts here sought to be set off are mutual debts; the operation of the statute is not limited to cases of debts arising out of or connected with the same transaction. *Bennett v. White*, [1910] 2 K.B. 643; *Edwards v. Hope*, 14 Q.B.D. 922, at 927; *Kohen v. Culley Brey & Dover Ltd.*, 57 O.L.R. 533, at 535, referred to. If above conclusion that the debts are mutual debts is right, it may be possible for defendant, by apt proceedings, to secure a pronouncement giving effect thereto; whether that be so or not is a question that should be dealt with by the Ontario courts.

Disagreement expressed with plaintiff's contention that there was no power in the Workmen's Compensation Board to assign its judgments.

Per Davis J.: Before issue of plaintiff's execution, there were proceedings or applications which defendant might have taken for the purpose of his relief now claimed. *Quaere*, whether there was any authority to make the order directing trial of the issue, after judgment and issue of execution. The issue of a writ of *fi. fa.* is an order of the court to make the money—the sheriff's authority comes from the court, not from the plaintiff (*Mahaffy v. Bastedo*, 38 O.L.R. 192). S. 21 of *The Execution Act* and s. 5 of *The Creditors' Relief Act* (R.S.O., 1937, chs. 125, 126) referred to. There must be an inherent jurisdiction in the court over its own process, but there would seem to be no authority for dealing with an execution after it has been placed in the sheriff's hands in the manner in which the proceedings in question were taken and continued. One can quite understand under special circumstances the court invoking an equitable jurisdiction to prevent a levy under execution where the execution debtor has a plain claim of a definite and fixed amount against the execution creditor. But where, as here, defendant acquired and held the Board's judgments (which, moreover, admittedly were subject to review as to amount in view of alleged payments upon them, and, further, included statutory penalties, which in any event were not subject-matter for a set-off) over three years before judgment in the action was given and took no step either to stay entry of judgment or issue of execution, there is no ground for intervention of any equitable jurisdiction there may be in the court. The matter is one of practice and procedure in Ontario. (*Executors of Elliott v. Crocker*, 1 Ont. P.R. 13, referred to).

APPEAL by the defendant from the order of the Court of Appeal for Ontario (1) allowing the plaintiff's appeal from the judgment of Greene J.

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In an action commenced on June 4, 1931, in the Supreme Court of Ontario, the plaintiff, on July 7, 1939, recovered judgment against the defendant for \$14,007.40 (and costs to be taxed) for damages for trespass. Plaintiff issued execution thereon, which was delivered to the sheriff of the District of Thunder Bay, who demanded from the defendant payment of \$15,887.63 (the above amount plus interest and sheriff's costs). The defendant, on August 2, 1939, paid to the sheriff \$6,413.35 and claimed to set off the balance as being the amount owing by the plaintiff in respect of five judgments obtained by the Workmen's Compensation Board and acquired by the defendant, as hereinafter mentioned.

The Workmen's Compensation Board of Ontario had, for default in payment of assessments, issued five certificates against the plaintiff, at various times from September, 1927, to September, 1934, pursuant to the provisions of what is now s. 108 of *The Workmen's Compensation Act*, R.S.O., 1937, c. 204. The said certificates were duly filed with the clerk of the District Court of the District of Thunder Bay, and, under said s. 108, when so filed, they would become orders of that Court and might be enforced as judgments of that Court. Thereafter executions were issued against the plaintiff and were renewed from time to time, and were, on August 2, 1939 (the date of defendant's claim of set-off above mentioned) in full force and effect.

On December 6, 1934, the Board, in consideration of \$1,214.92, assigned all its rights, title and interest in the assessments levied and in the certificates and orders of the court under said s. 108, and all interest due or thereafter to become due and all moneys recoverable thereunder, to one who, on February 3, 1936, assigned to the defendant all his right, title and interest in and to plaintiff's indebtedness to the Board and the certificates and in the orders of court and executions issued thereunder and all interest due or thereafter to become due and all moneys recoverable thereunder.

The plaintiff refused to admit the defendant's right of set-off. Plaintiff also (in pleadings subsequently delivered) disputed the amount claimed by the defendant as owing under the executions, alleged that the Board's claim had been satisfied, and disputed the validity of the Board's assignment, and claimed that in any event the defendant

was only entitled as against the plaintiff by virtue of such assignment (if to any amount) to what was actually paid to the Board for its assignment.

By an order of Kelly J. of August 31, 1939, the trial of an issue was directed to determine whether the defendant was entitled to set off against the amount of the judgment of the plaintiff in the action the amount of the said five judgments recovered by the Board against the plaintiff and assigned to and now held by the defendant; and whether the writ of *feri facias* issued by the plaintiff had been fully satisfied either by payment, set-off or partly by one and partly by the other or in any other manner whatsoever, or if not so satisfied, how much was now owing thereunder. By a subsequent order of McKay J. delivery of pleadings was directed, and (on consent) proceedings to enforce the plaintiff's writ of execution were stayed.

The issue came on for trial before Greene J. He gave judgment declaring that defendant was entitled to set off against the said judgment recovered against him by plaintiff the amount of the said judgments recovered by the Board against plaintiff and assigned as aforesaid, subject to the amount of such set-off being determined by a reference, and he directed a reference to ascertain the total amount owing on such judgments, and directed that any amounts embodied in such judgments in the nature of penalties should not be included in computing the total amount due under such judgments.

On appeal by the plaintiff to the Court of Appeal for Ontario, that Court allowed the appeal and directed judgment declaring that defendant was not entitled to set off against the said judgment recovered against him the amount of the said judgments recovered by the Board and assigned to him, but permitting either party to have a reference to ascertain the total amount owing on such judgments. That Court (1) held that the claims indicated by the cross judgments were not in their nature mutual debts even when the plaintiff's claim was liquidated, and there was no right, therefore, to set them off; and moreover, that defendant had not proceeded, on his claim for relief, in the proper way.

(1) [1941] O.W.N. 472; [1942] 2 D.L.R. 120.

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The defendant appealed to this Court. By the judgment now reported, the appeal was dismissed, without prejudice to any application that defendant might be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against plaintiff by the Workmen's Compensation Board and assigned to him. (No costs of the appeal were, by the majority of the Court, given to either party. Davis J. would dismiss the appeal with costs, without prejudice to any other proceedings that appellant might be advised to take in respect of the assigned certificates or judgments of said Board held by him).

Glyn Osler K.C. and *Archibald Laidlaw* for the appellant.

J. R. Cartwright K.C. for the respondent.

The judgment of the Chief Justice and Kerwin, Hudson and Taschereau JJ. was delivered by

KERWIN J.—This is an appeal by J. E. Kallio from a judgment of the Court of Appeal for Ontario reversing a judgment of Greene, J., after the trial of an issue. What this issue was and how the order directing its trial came to be made may be better understood by a recital of certain prior events.

On June 4th, 1931, the respondent, Russell Timber Company Limited, issued a writ in the Supreme Court of Ontario against Kallio for damages for trespass. An order was ultimately made referring the action for trial to a District Court Judge but before the trial Kallio secured an assignment of certain judgments recovered by the Ontario Workmen's Compensation Board against the respondent. Between 1927 and 1934, under the provisions of what is now section 108 of the *Workmen's Compensation Act*, R.S.O., 1937, chapter 204, the Board had issued certificates stating that assessments under the Act had been made and showing the amounts remaining unpaid on them and that they were payable by the respondent. These certificates had been filed with the Clerk of a District Court and, by virtue of the section, they became orders of that Court and might be enforced as judgments for the amounts mentioned in the certificates. They had been assigned by the Board to an intermediate assignee, who, on February 3rd, 1936, assigned them to Kallio.

In 1939, judgment was given in the original action in the amount of \$14,007.40 and costs to be taxed. It is stated in the appellant's factum and has not been controverted that, without waiting to tax its costs, the respondent issued execution on this judgment for the above amount with interest and sheriff's costs. On August 2nd, 1939, Kallio paid the sheriff \$6,413.35 and claimed to set off the balance as being the amount owing by the respondent to him in respect of the Board's judgments. The respondent refused to admit this claim, and Kelly, J., on Kallio's application, made an order staying proceedings under the execution and directing the trial of an issue to determine whether or not the appellant was entitled to a set-off as claimed and the amount, if any, owing under the Board's judgments.

This was the issue tried by Greene, J. At the trial it was admitted that writs of execution had been issued on the Board's judgments, that the judgments and writs had been assigned by the Board, and by its assignee to Kallio, and that the writs of execution had been renewed from time to time and were in full force and effect on August 2nd, 1939, when the payment of \$6,413.35 was made by Kallio to the sheriff. The proceedings resulting in the order of Kelly, J., were launched shortly thereafter. Greene J. determined that a right of set-off existed subject to the amount of such set-off being determined on a reference to be had before a Master who was directed, in accordance with subsection 1 of section 124 of the Ontario *Judicature Act*, R.S.O., 1937, c. 100, that any amounts in the nature of penalties included in such judgments should not be taken into consideration in computing the total amount due. As has been stated, the judgment of Greene J. was set aside by the Court of Appeal, and hence this appeal.

In addition to the circumstance that some of the certificates had been filed by the Board after the respondent had commenced its action for damages for trespass, there is also the fact, as pointed out by Mr. Justice Middleton in the Court of Appeal, that the assignment to Kallio had occurred subsequent to the issue of the writ of summons. In that learned Judge's view, under the Ontario Rules of Practice, Kallio should have set up any claim he had by way of counterclaim in the original action, and this was not accomplished. At page 37 of

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the record appears a reference to a judgment of Mr. Justice McTague, which I understand is the one reported in [1937] O.W.N. 12 (1). Apparently, after the order referring the issues in the original action for trial to a District Court Judge, Kallio had secured an order from the latter permitting him to file a counterclaim setting up the very claim he now advances, and the Timber Company filed a defence to that counterclaim. The application to McTague J. was to set aside the order of the District Court Judge on the ground of lack of jurisdiction. McTague J. made the order as asked but refused Kallio's application, made at the same time, to refer for trial the issue created by the District Judge's order. It also appears on the same page of the record that an application for leave to appeal to the Court of Appeal from the order of McTague J. had been refused.

I would not interfere with the order of the Ontario Court of Appeal in this case on a question of practice in that province, particularly when the reasons therefor are given by such a master of that practice as Mr. Justice Middleton. Mr. Justice Middleton, however, stated that he preferred to deal with the matter by placing his decision on the merits of the case and, on the merits, he determined that the claims indicated by the Board's judgments and the judgment for damages for trespass were not in their nature mutual debts even when the Timber Company's claim was ascertained by judgment. He therefore concluded that, assuming that Kallio was justified in remaining silent until after judgment was secured against him by the respondent, he (Kallio) had to proceed having regard to the rules of practice in that behalf. Apparently the learned judge considered that in a proper case such an application might have been made under the provisions of Rule 523. While Mr. Justice Masten's grave doubts as to whether Rule 523 was applicable had not been fully resolved, he stated they were not sufficient to warrant him expressing a dissenting opinion and he agreed with Mr. Justice Middleton. It is obvious, however, that the latter considered that even if the application to Kelly J. could have been treated as made under Rule 523, no right of set-off existed because of his view that the debts were not mutual.

With deference, I am unable to agree that in the action by the respondent for damages for trespass, judgments against the respondent in another court, which had been assigned to the appellant, could not be set off under the provisions of sections 123 and 124 of the *Judicature Act*. All that is required by these sections is that there should be a mutual debt, that is, one owing to A by B and not by someone else. By the very terms of subsection 1 of section 124 "mutual debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature." The operation of the statute is not limited to cases of debts arising out of or connected with the same transaction. In *Bennett v. White* (1), the Court of Appeal in England decided that a defendant might set off a debt which had been owing by the plaintiff to another person and which had been assigned to the defendant.

In England, even before the Judicature Acts and prior to the statutes providing for the assignment of choses in action, one court might permit a set-off against a judgment of its own or a judgment in another court. In *Edwards v. Hope* (2), Lord Justice Bowen said, at page 927:—

The Courts before the present rules had an equitable jurisdiction to set off against each other cross judgments in the same action or in different actions and in the same or in different courts. The old practice is explained in Chitty's Practice, 8th ed., p. 625; and it appears that in consequence of a diversity in the practice of the Court of Queen's Bench and that of the other courts, rule 93 of 2 Wm. 4, was passed, which is in the same terms as rule 63 of the Rules of Hilary Term, 1853, and which protected the solicitor's lien where the set-off was asserted in different actions.

And in Ontario, Mr. Justice Middleton, speaking for the Appellate Division in *Kohen v. Culley Breay & Dover Ltd.* (3),—dealing, it is true, with an entirely different matter,—remarks as follows at page 535:—

The right of a litigant to set off a sum, for which he has already recovered judgment, against a sum which his debtor may recover against him, is an equity which it is the duty of the Court to give effect to. This is established by a series of cases, of which *Throckmorton v. Crowley* (4) and *Moody v. Canadian Bank of Commerce* (5) will serve as examples. This equity may be given effect to either at the trial or upon a substantive application. To avoid expense and confusion it is desirable that the Judge on the hearing should determine the question without putting the parties to the expense of a substantive application.

(1) [1910] 2 K.B. 643.

(3) (1925) 57 O.L.R. 533.

(2) (1885) 14 Q.B.D. 922.

(4) (1866) L.R. 3 Eq. 196.

(5) (1891) 14 P.R. 258.

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It should be emphasized that so far as Kallio's claim is concerned, we are here dealing with judgments of a District Court. If I am right in the conclusion that the debts are mutual debts, it may be possible for the appellant, by apt proceedings, to secure a pronouncement giving effect thereto. Whether that be so or not is a question that should be dealt with by the Ontario Courts. While I would therefore dismiss the present appeal, I would do so without prejudice to any application that Kallio may be entitled to make to have effect given to the equity referred to. I should add that, having fully considered the point, I am unable to agree with Mr. Cartwright's argument that there was no power in the Workmen's Compensation Board to assign its judgments.

The Court of Appeal determined that there should be no costs of these proceedings to either party. The costs of this appeal might very well be disposed of in the same manner.

DAVIS J.—It is important to observe at once that we are not dealing in this appeal with a set-off in an action before judgment. We are dealing with the case of an execution in the hands of a sheriff.

What the appellant, as execution debtor, seeks to do is to set off against the amount of the execution debt the amount of an indebtedness which the execution creditor originally owed to the Ontario Workmen's Compensation Board (such indebtedness being represented by statutory certificates of the Board which were filed as judgments of the court many years ago and renewed from time to time) and which debt the appellant by assignment acquired and now holds. But the appellant acquired these certificates or judgments representing the indebtedness of the execution creditor to the Workmen's Compensation Board some three years before judgment was pronounced in the action out of which the execution in question arose. Moreover, these certificates or judgments are admitted by the parties to be subject to review in that the execution creditor claims to have made some payments upon them; further they include certain statutory penalties which in any event are not proper subject matter for a set-off. The certificates appear to have been purchased by the execution debtor at a great discount and he seeks to be given credit for their full face value.

The action out of which the execution in question arose was one for damages in trespass. Notwithstanding that the defendant (now execution debtor) held these certificates or judgments for three years before any judgment was pronounced in the action, he apparently said nothing and did nothing about them until after the execution was issued. If they could not be used as a set-off in the action, they could have been brought in by way of counterclaim. At any rate, when judgment was pronounced a stay of the entry of judgment for the purpose of obtaining proper credits could have been applied for, or a stay of execution. Nothing of this sort was done. Subsequently an application was made in the action and an order made for the trial of an issue to determine:

(a) Whether the defendant is entitled to set off against the amount of the judgment recovered by the plaintiff, Russell Timber Company Limited, in this action the amount of five several judgments recovered by the Workmen's Compensation Board in the District Court of the District of Thunder Bay against the plaintiff, Russell Timber Company Limited, and assigned to and now held by the defendant.

(b) Whether the writ of *fi. facias* issued by the plaintiff, Russell Timber Company Limited, pursuant to its judgment in this action to the sheriff of the District of Thunder Bay has been fully satisfied either by payment, set-off or partly by one and partly by the other or in any other manner whatsoever, or if not so satisfied, how much is now owing thereunder.

It is unnecessary, in the view I take of the appeal, to consider whether there was any authority to make such an order in the action, after judgment and the issue of execution. The issue of a writ of *fi. fa.* is an order of the court to make the money; in other words, the authority of the sheriff comes from the court, not from the plaintiff. *Mahaffy v. Bastedo* (1).

Section 21 of *The Execution Act*, R.S.O., 1937, ch. 125, provides that,

Subject to the provisions of *The Creditors Relief Act* the sheriff shall pay over to the party who sued out the execution the money so paid or recovered * * *

Section 5 of *The Creditors Relief Act*, R.S.O., 1937, ch. 126, provides that,

(1) Where a sheriff levies money under an execution against the property of a debtor, * * * he shall forthwith make an entry in a book to be kept in his office open to public inspection * * *

(2) The money shall thereafter be distributed rateably among all execution creditors and other creditors whose executions or certificates

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given under this Act were in the sheriff's hands at the time of the levy or receipt of the money, or who deliver their executions or certificates to the sheriff within one month from the entry, * * *

There must be an inherent jurisdiction in the court over its own process but I know of no authority for dealing with an execution after it has been placed in the sheriff's hands in the manner in which these proceedings have been taken and continued. One can quite understand under special circumstances the court invoking an equitable jurisdiction to prevent a levy under an execution where the execution debtor has a plain claim of a definite and fixed amount against the execution creditor. But where, as here, the execution debtor acquired and held the certificates of judgment of the Workmen's Compensation Board over three years before judgment in the action was given and took no step either to stay the entry of judgment or the issue of execution, I cannot see any ground for the intervention of any equitable jurisdiction there may be in the court.

The matter is one of practice and procedure in the Province of Ontario. As far back as 1851, Chief Justice Draper, in *The Executors of Elliott v. Crocker et al.* (1), refused to allow judgment debtors to set off against the amount of an execution against them the amount of a judgment against the execution creditor which they had bought up for that purpose. It did not appear whether the defendants even obtained the assignment of the judgment until after the return day of the execution in the cause. Chief Justice Draper discharged a rule *nisi* to set off the judgment, on the ground that the defendants, instead of paying the plaintiffs what they had recovered, expended money which might have been so applied in buying up a judgment against the plaintiffs. Mr. Justice Middleton, the recognized authority on practice matters in the Province of Ontario, relied upon that decision in his judgment in this case and said "that authority has never been departed from in Ontario."

I should dismiss the appeal with costs.

In the view I take of the appeal, it has been unnecessary to consider the question of the validity of the assignments of the certificates or judgments of the Workmen's Compensation Board or the rights of the appellant, if any,

(1) 1 Ont. Practice Rep. 13.

thereunder against the respondent, and I should therefore make the dismissal of the appeal without prejudice to any other proceedings the appellant may now be advised to take.

Appeal dismissed without prejudice to any application that appellant may be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against respondent by the Workmen's Compensation Board and assigned to him. No costs of the appeal to either party.

Solicitors for the appellant: *McComber & McComber.*

Solicitor for the respondent: *Cyril V. O'Connor.*

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